United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

Court original

75-4132

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

against

THE FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

THE WESTERN UNION TELEGRAPH COMPANY,
STATE OF HAWAII and ITT WORLD COMMUNICATIONS INC.,
Intervenors.

PETITION FOR REVIEW OF MEMORANDUM OPINION
AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

PETITION BY INTERVENOR THE WESTERN
UNION TELEGRAPH COMPANY FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC

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INTRODUCTION

Pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, Intervenor The Western Union Telegraph Company (the "Telegraph Company") hereby petitions the Court for rehearing of the above-captioned matter. The Court's earlier decision was rendered on October 20, 1976 in a majority opinion by Judges Anderson and Mulligan (the "majority's decision"), with a dissenting opinion

by Judge Mansfield (cited herein "slip op. p. __"). Rehearing is requested on the ground that the majority's decision overlooks or misapprehends basic points of law and fact (Fed. R. App. P. 40(a)) as shown below.

In addition, the Telegraph Company respectfully suggests that the case is an appropriate one to be reheard in banc (28 U.S.C. § 46(c)) because of the exceptional importance of the issues (Fed. R. App. P. 35) and because the decision conflicts with Circuit and United States Supreme Court precedent.

EXCEPTIONAL IMPORTANCE OF THE CASE

The "exceptional importance" of the issues in this case is based on the following special considerations:

(A) The majority's decision involves a construction of a federal statute which results in a decisive limitation on the power of the Federal Communications Commission to determine the public interest in the provision of a major new communications service to a part of the United States;

(B) It similarly circumscribes the Commission's power to consider, among competing applications, the Telegraph Company's ability to render superior service in connection with all future record communications technologies and services;

(C) It reduces the weight traditionally accorded determinations by the Commission of matters within its special competence, and by reading legislative history in a restricted manner interferes with the Commission's ability to achieve the

goals of the Communications Act of 1934; and

(D) It places the Telegraph Company at a concrete and substantial competitive disadvantage now and for all time.

These are special and serious consequences. They are the result of the narrowest of divisions, philosophically and numerically, between the majority of the panel on the one hand and Judge Mansfield and a unanimous Federal Communications Commission on the other. They reflect issues of exceptional policy importance, and exceptional economic impact, which warrant a broader review by this Court.

STATEMENT OF THE CASE

This case involves a Memorandum Opinion and Order issued by the FCC on June 23, 1975 in which the FCC interpreted Section 222(c)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. (the "Communications Act"), which was added to the Communications Act in 1943 and provides as follows:

> "[a]ny proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger . . ."

The FCC held that, divestiture in compliance with the statute having occurred, Section 222(c)(2) is not an absolute and all-encompassing bar to the Telegraph Company's furnishing international telegraph services. Specifically, the FCC held that, consistent with the public interest and the broad powers vested in it by the Communications Act, it has jurisdiction to consider

the merits of the Telegraph Company's application under Section 214 of the Communications Act* to furnish a new telegraph service called "Mailgram" between the Continental United States and Hawaii, an international point for purposes of Section 222. The FCC reasoned that the language and legislative history of Section 222 showed that Congress did not intend Section 222 to supersede other pertinent sections of the Communications Act. (A44; 55 F.C.C.2d 668 (1975)).

The majority's decision vacates and sets aside the FCC's Memorandum Opinion and Order. Dismissing the significance of the language of Section 222 and the importance of the FCC's powers granted elsewhere in the Communications Act, the majority's decision states that it will not read

> "§ 222(c)(2), as the FCC read it, to make it consistent with other sections of the Communications Act which furnish only broad legislative goals and give the FCC 'broad and flexible powers to achieve those goals in the light of changing circumstances.'" (Slip op. p. 166)

In so ordering, the decision ties the hands of the FCC in performing functions mandated by Congress, and overlooks the relationship between Congress and the FCC also mandated by Congress.

Judge Mansfield dissents from the majority's decision because

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* Section 214 contains, inter alia, a broad grant of authority to the FCC to authorize new services such as Mailgram "where the present or future public convenience or necessity require . . ."

> "both the plain language of § 222 . . . and the circumstances surrounding its enactment make it clear that in authorizing [the Telegraph Company] and Postal Telegraph, Inc. . . . to merge, Congress did not bar the merged enterprise from ever again entering into any international operations. If Congress had wished to enact such a prohibition, it could easily have done so." (Slip op. p. 172)

Judge Mansfield concludes that the FCC Memorandum Opinion and Order

> "is in keeping with the pattern and scheme of the Act, which is to set forth legislative objectives and give broad authority to the FCC, as the depository of expertise in the complex business of communications, to implement those principles and achieve the objectives in the light of changing technology and market developments. See United States v. Southwestern Cable [Co.], 392 U.S. 157, 172-73 (1968)." (Slip op. pp. 177-78)

ARGUMENT

I.

THE MAJORITY DECISION'S SEVERE LIMITATION OF THE FCC'S JURISDICTION MERITS A REHEARING IN BANC

The majority's decision is contrary to the underlying rationale of the Communications Act and is inconsistent with the Supreme Court's view of the plan of the Act as described in United States v. Southwestern Cable Co., 392 U.S. 157 (1968) and more recently reiterated in United States v. Midwest Video Corp., 406 U.S. 649 (1972). If allowed to stand, the majority's decision will frustrate the FCC's efforts to fulfill the statutory mandate, relied on by the Supreme Court in the cases

cited, to "make available, so far as possible, to all the people of the United States a rapid, efficient, nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." (Communications Act, Section 1, 47 U.S.C. § 151).

The present case thus involves a question of great importance to the administration of the Communications Act and to the future development of the communications industry.

In United States v. Southwestern Cable Co., 392 U.S. 157 (1968), the Supreme Court recognized that in Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), Congress granted the FCC "unified jurisdiction" and "broad authority" over all interstate and foreign communication by wire or radio. (392 U.S. at 172-173) The Court's rationale for this expansive delegation was that the complex and dynamic nature of the communications industry renders it impossible for Congress to provide for every future communications problem and development. (392 U.S. at 172). This Circuit has applied this reasoning to find FCC jurisdiction over communication matters not expressly entrusted to the FCC. Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 480 (2d Cir. 1971)*. See also GTE Service Corp. v. F.C.C.,

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* Southwestern Cable Co. and Mt. Mansfield Television, Inc. involved the FCC's authority over matters affecting its regulation of broadcasting. The United States Supreme Court has noted that the FCC's authority over the telegraph industry is even broader than its authority over broadcasting. United States v. Radio Corp. of America, 358 U.S. 334, 348-50 (1959).

474 F.2d 724, 731 (2d Cir. 1973).

The majority's decision, without attempting to reconcile Section 222 with other provisions of the Communications Act, states that

> "Should the FCC wish further broad and flexible powers to adapt to changed circumstances, as may be the case here, Congress, and not this court, must be the one to grant the essential power." (Slip op. p. 166)

Fundamentally, this conclusion involves the construction of Section 222(c)(2) as a specific and significant restriction on the broad power granted the FCC under Section 214 to consider applications for authority, on a public interest basis, to render communications service. This squarely conflicts with the Supreme Court's admonition in the Southwestern Cable case that courts should not

> "'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'" (392 U.S. at 177, quoting Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1968)).

Furthermore, the conclusion of the majority disregards the fact that Congress granted broad authority to the FCC over the communications industry to avoid the need for repeated Congressional revision and review of FCC authority. Washington Utilities & Transp. Com'n v. F.C.C., 513 F.2d 1142, 1157 (9th Cir. 1975); National Ass'n of Theatre Owners v. F.C.C., 420 F.2d 194, 199 (D.C. Cir. 1969), cert. denied 397 U.S. 922 (1970); General Tel. Co. of California v. F.C.C., 413 F.2d 390, 398 (D.C. Cir.), cert. denied 396 U.S. 888 (1969) (per Burger, J.).

In sum, the majority's decision neither accepts nor discharges the heavy burden traditionally associated with restrictions of regulatory power. See United States v. Southwestern Cable Co., 392 U.S. 157, 177 (1968); Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1968).

Indeed, if the majority's suggested remedy of Congressional revision should prevail, an "intolerable regulatory burden" would be placed on Congress -- the very burden "which [Congress] sought to escape by delegating administrative functions to the Commission." General Tel. Co. of California v. FCC, 413 F.2d 390, 398 (D.C. Cir.), cert. denied 396 U.S. 888 (1969) (per Burger, J.).

The effect of the majority's decision is to transform Section 222(c)(2) into a statute which rigidly structures the telegraph communications industry in a manner at odds with the views of the expert agency entrusted by Congress to oversee that industry. The decision clearly precludes the FCC from considering whether the Telegraph Company may provide Mailgram or any other telegraph service internationally, even if the Telegraph Company were the best or the only entity capable of providing such services. The decision marks a break from, and may require re-examination of, a long line of FCC opinions finding that competition in the telegraph industry is desirable. See, e.g. International Record Carriers' Communications, F.C.C. 76-174 (February 26, 1976); Inquiry into Policy to be Followed in Future Authorization of Overseas Dataphone Services, Report and Order, F.C.C. 76-10 (January 19, 1976); International Record Carriers' Communications, 38 F.C.C.2d 543 (1972);

Specialized Common Carrier Services, 29 F.C.C.2d 870, reconsideration denied 31 F.C.C.2d 1106 (1971), aff'd sub. nom. Washington Utilities Transp. Com'n v. F.C.C., 513 F.2d 1142 (9th Cir. 1975), cert. denied 423 U.S. 836 (1975).*

II.

THE MAJORITY'S DECISION MISAPPREHENDS IMPORTANT QUESTIONS OF FACT AND LAW

A. The Majority Fails to Read Section 222(c)(2) in Context With Other Applicable Provisions of the Communications Act.

In construing Section 222(c)(2), the majority ignored significant rules of construction established by the Supreme Court and followed by the Circuit Courts of Appeals, including this Circuit.

The majority's decision determines that it is irrelevant that the FCC, under its general powers in Section 1 and 2 of the Communications Act and under its specific powers under Section 214 and elsewhere in the Act, has ample authority, in issuing certificates of public convenience and necessity, to regulate adequately the furnishing of international telegraph service by the Telegraph Company. By isolating Section 222(c)(2) from its statutory context, the decision violates the Supreme Court's rule against looking to a single sentence or section of a statute rather than all provisions of the law and its object

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* The United States Supreme Court has held that the FCC may in its discretion decide to foster competition if the FCC deems such a course to be in the public interest. F.C.C. v. RCA Communications, Inc., 346 U.S. 86, 96-97 (1953).

and policy as a whole.* See Richards v. United States, 369 U.S. 1, 11 (1962); United States v. Storer Broadcasting Co., 351 U.S. 192, 203 (1956).

As stated by now Chief Justice Burger:

> "To give the [Communications] Act the overly restrictive interpretation urged by Petitioners would be to prevent the [FCC] from employing the regulatory devices which have been established for effective common carrier control - a particularly sterile result when the carrier activity is augmenting the operations of parties which are the particular concern of the Commission's regulatory responsibility. ... We have previously noted that the Commission's regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive, pervasive regulatory scheme." General Tel. Co. of California v. F.C.C., 413 F.2d 390, 402 (D.C. Cir.), cert. denied 396 U.S. 888 (1969) (citations omitted).**

Consistent with this view, the interpretation urged by Judge Mansfield in his dissent herein results in a reading of Section 222(c)(2) in harmony with the other provisions of the Communications Act.

B. The Majority's Decision Erroneously Fails to Give Weight to the FCC's Determination of Its Own Jurisdiction

The majority recognizes the general rule that courts

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* Even though Section 222 was added to the Communications Act by amendment in 1943, it must be read in conjunction with the remainder of the Act as if it were enacted with the original statute. Kirchner v. Kansas Turnpike Authority, 336 F.2d 222, 230 (10th Cir. 1964).

** A narrow construction of Section 222(c)(2) is also mandated in this case because a broad construction of this provision would limit international telegraph competition. See United States v. Masonite Corp., 316 U.S. 265, 280 (1942).

normally give special weight to an agency's interpretation of its own statute. However, citing United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 858 n.25 (1975), the majority's decision refuses to apply this rule in the present case because it claims that the FCC's Memorandum Opinion and Order is in conflict with eariler FCC decisions.

This position, consistent with the majority's restrictive construction of the Communications Act and the design to support that construction, does not stand up under analysis.

In the first place, as Judge Mansfield's dissent points out, Telegraph Service with Hawaii, 28 F.C.C. 599, aff'd on reconsideration, 29 F.C.C. 714 (1960), on which the majority primarily relies to establish an FCC conflict, is clearly distinguishable from the Memorandum Opinion and Order here under review. (Slip op. p. 177) Although the FCC in Telegraph Service with Hawaii commented in passing that Section 222 precluded the Telegraph Company from competing with international carriers in providing telegraph services to overseas points, the FCC made this statement solely in the context of whether the new State of Hawaii might be treated as a domestic rather than an international point.* Moreover, as Judge Mansfield noted (slip op. p. 177), this statement was made by the FCC prior to the Telegraph Company's divestiture of its international telegraph

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* The Telegraph Company in Telegraph Service with Hawaii sought only to provide certain telegraphic services to Hawaii as a domestic point, based on Hawaii's new Statehood status.

operations in 1963. The FCC, therefore, simply assumed that, because Hawaii remained an international point, any Telegraph Company telegraph services to Hawaii would be subject to the outstanding divestiture order.

In the second place, the majority's decision misinterprets the Supreme Court opinion relied on by it, United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 858-59 n. 25. (1975). In that case, the Supreme Court merely held that the SEC's interpretation of a statute, presented to it in an amicus curiae brief, would be given little weight because that argued interpretation flatly contradicted a prior recent decision of the agency itself. We submit that the Forman case does not support the proposition for which it is cited in the majority's decision. (Slip op. p. 168).

Indeed, this Circuit has given weight to an FCC interpretation of the Communications Act regarding its jurisdiction notwithstanding a prior inconsistent view. See Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 480 & n.33 (2d Cir. 1971). See also United States v. Southwestern Cable Co., 392 U.S. 157, 170, 177 (1968). In Mt. Mansfield Television, Inc., this Circuit accepted the FCC's explanation that its previous disclaimers of authority were made in a context in which it did not have occasion to discuss fully the jurisdictional questions.* (422 F.2d at 480 & n.33)

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* As the FCC stated in its Memorandum Opinion and Order herein, the question at issue in the present case is one of first impression. (A16 - A17; 55 F.C.C.2d 668 (1975)).

C. The Majority's Decision Gives Inappropriate Weight to Ambiguous Legislative History.

The majority reviews the evolving language of Section 222(c)(2) as it progressed through Congress and concludes that Section 222(c)(2) is an absolute and permanent bar to the Telegraph Company's furnishing of international services. Two reasons are given for this conclusion: (a) the final version of Section 222(c)(2) required the Telegraph Company to divest its international telegraph operations; and (b) the only discretion given to the FCC in Section 222(c)(2) was to determine the time of divestment.*

The Telegraph Company recognizes that Section 222(c)(2) required divestiture by the Telegraph Company of its international operations "theretofore carried on". It is a non sequitur to argue that such a divestiture requirement prohibits forever and unconditionally entry by the Telegraph Company into any and all international operations. Section 222(c)(2) does not address the question of the Telegraph Company's post-divestiture entry into such operations.

It is also recognized that Section 222(c)(2) authorizes the FCC to fix the time for divestiture. However, this in no way justifies a construction of Section 222(c)(2) effectively repealing the FCC's Section 214 authority -- organic to its purposes --

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* Judge Mansfield's dissent (Slip op. p. 174-75) points out the majority's misplaced reliance on the statements of indiviuals in the course of legislative history to contravene the plain language of Section 222(c)(2). On this point, see National Ass'n of Theatre Owners v. F.C.C. 420 F.2d 194, 201 (D.C. Cir. 1969), cert. denied 397 U.S. 922 (1970).

to consider the public interest and convenience in passing on future applications by the Telegraph Company to provide international telegraph services.*

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* The majority's conclusion that its construction is necessary to avoid evasion of the statute (slip op. p. 170) accords no recognition to the fact that FCC consideration of the merits of the Hawaii Mailgram application, under Section 214 of the Act, will take into account post-divestiture changes in the technological and competitive situation. This was recognized in Judge Mansfield's dissent. (Slip op. p. 176)

CONCLUSION

In view of the foregoing, we respectfully urge a rehearing and suggest the appropriateness of a rehearing in banc.

Dated: November 3, 1976

Respectfully submitted,

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I, JOSEPH H. STALLINGS, hereby certify that the foregoing Petition for Rehearing and Suggestion for Rehearing in Banc of Intervenor The Western Union Telegraph Company was served this 3rd day of November, 1976, by mailing two copies thereof, postage prepaid, to each of the following persons at the addresses shown below:

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3rd day of November, 1976.

Meryle Sedor
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